Master Strike Sdn Bhd v Sterling Heights Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–1050 OF 2001
MOKHTAR SIDIN, ARIFIN ZAKARIA AND NIK HASHIM JJCA
26 APRIL 2005

Land Law — Sale of land — Breach of contract — Forfeiture of deposit — Whether forfeiture justified

Land Law — Sale of land — Breach of contract — Forfeiture of deposit — Whether time of essence of contract

Land Law — Sale of land — Contract for sale — Non-completion by purchaser — Whether vendor entitled to forfeit deposit — Whether vendor failed to co-operate with purchaser to enable completion

This appeal arose out of a sale and purchase agreement relating to several pieces of land which agreement was executed between the appellant as purchaser and the respondent as vendor for a consideration of RM71,409,848.04 ('the said agreement'). At the time of the execution of the said agreement, a sum of RM7,140,984.80 being 10% of the total purchase price was paid by the appellant by way of deposit ('the deposit'). The receipt of the said sum was acknowledged by the respondent under cl 2.1(a) of the said agreement. Under cl 2.1(b) of the said agreement, the balances of the purchase price were to be settled in two trances ('the balance'). The appellant failed to pay the balance. The respondent then terminated the said agreement and forfeited the deposit. The appellant filed a writ in the High Court applying for a declaration that the termination of the said agreement by the respondent was null and void, and the deposit be returned to the appellant with interest. The High Court dismissed the appellant's application. The primary issue here in this appeal was whether the respondent was entitled to terminate the said agreement and forfeit the deposit. The contentions of the appellant broadly cover three areas, namely: (i) the respondent had failed to co-operate with the appellant to enable the completion of the said agreement in that the appellant had failed to meet the requirements set by the appellant's lender, Maybank that the respondent was to deliver the land title to Maybank and create a lien-holder's caveat. The appellant alleged that the failure or refusal by the respondent to consent to lodgment of a lien-holder's caveat on the land in favour of Maybank for facilities granted to the appellant's associated company, Country Heights Industries Sdn Bhd, which was not a party to the said agreement, was a non co-operation under cl 30 of the said agreement; (ii) time had ceased to be of the essence of the said agreement as the appellant was negotiating with the respondent over the mode and time of payment of the balance; and (iii) the conduct of the respondent was such that it would be just and equitable for the deposit to be returned to the appellant.

Held, dismissing the appeal:

(1) The respondent's refusal to consent for the creation of a lien-holder's caveat in favour of Maybank was justified. Clause 30 of the said agreement which the appellant called a 'good faith' clause was confined to co-operation for doing acts or things authorised or permitted under the terms set out in the said agreement and did not extend to matters not provided for in the said agreement. Clause 30 did not mean that the respondent must do whatever to please the appellant even to the extent of exposing the respondent to loss and detriment. The said agreement did not provide for the creation of a lien and by the omission in the said agreement for such a lien, it was not open to the appellant to request for the creation of the lien. The terms in the said agreement were exhaustive and mandatory in nature. The court had no alternative but to interpret the said agreement strictly in accordance with its own terms (see para 12).

(2) The creation of a lien-holder's caveat, by way of third party security, would prejudice the respondent. The lender, Maybank in return for an offer of a credit facility of to Country Heights Industries Sdn Bhd, required a lien-holder's caveat from the respondent pending the creation of a charge by the appellant. Pending the creation of the charge, the respondent's land becomes security for the loan to Country Heights Industries Sdn Bhd. The respondent would not be paid the balance immediately but would be paid according to the terms stipulated in the said agreement even though the full loan sum was released to and used by Country Heights Industries Sdn Bhd. The facility far exceeded the purchase price. The obvious risk was that in the event of default by Country Heights Industries Sdn Bhd, the respondent's land would be sold and the respondent would not be paid the balance. Thus, the respondent would be exposed to unnecessary risk of parting with the titles without the payment (see para 15).

(3) The respondent never allowed any extension of time for completion but insisted on payment on the due date. There was no negotiation between the parties (see para 21). Furthermore, cl 27 of the said agreement expressly provides that any variation to the agreement must be in writing. Until an agreement in writing is reached by the parties, all rights and obligations under the said agreement remained valid and enforceable. Besides, cl 32 of the said agreement prevents the operation of waiver or acquiescence on the rights of the parties; and that the parties are entitled to demand strict performance of the provisions of the said agreement (see para 23); *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 distinguished.

(4) There was no need for immediate termination. The termination of the agreement took place 16 days after the due date. On the evidence, there was no waiver by the respondent on its rights with regard to the payments on the due date under the said agreement. Under cl 33 of the said agreement, failure or delay to exercise the right to forfeit immediately shall not

affect or impair the respondent's right to forfeit. Hence by cl 33, the respondent's right to forfeit under the said agreement was not lost by the delay (see para 25).

(5) The obligation to pay the purchase price was a fundamental obligation (see para 26). Thus, any breach for non payment of the purchase price shall go to the root of the said agreement thereby rendering the said agreement terminated and the deposit forfeited; *Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190 followed. In the instant case, where time was stipulated as of the essence, the respondent was entitled to forfeit the deposit on account of the appellant's breach to pay the balance of purchase price on time (see para 27); *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711 followed. It was therefore irrelevant how the appellant made its arrangements to pay the purchase price. The purchase price must be paid on schedule. The economic slowdown was not relevant and did not excuse the breach of fundamental obligations to pay the balance. The appellant's failure to pay the balance was clearly a breach of contract entitling the respondent to forfeit the deposit. The respondent was not required to prove that it had suffered any damage before it could forfeit the deposit (see para 28); *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577 followed.

[**Bahasa Malaysia summary**

Rayuan ini timbul daripada satu perjanjian jual beli berkaitan beberapa bidang tanah yang mana perjanjian tersebut telah disempurnakan antara perayu sebagai pembeli dan responden sebagai penjual untuk balasan sejumlah RM71,409,848.04 ('perjanjian tersebut'). Pada masa penyempurnaan perjanjian tersebut, sejumlah RM7,140,984.80 yang merupakan 10% daripada jumlah harga belian telah dibayar oleh perayu melalui deposit ('deposit tersebut'). Penerimaan jumlah tersebut telah dimaklumkan oleh responden di bawah fasal 2.1(a) perjanjian tersebut. Di bawah fasal 2.1(b) perjanjian tersebut, baki harga belian tersebut hendaklah dilangsaikan dalam dua pembayaran ('baki tersebut'). Perayu gagal membayar baki tersebut. Responden kemudian membatalkan perjanjian tersebut dan melucuthak deposit tersebut. Perayu telah memfailkan writ diMahkamah Tinggi memohon satu deklarasi bahawa pembatalan perjanjian tersebut oleh responden adalah terbatal dan tidak sah, dan deposit tersebut dipulangkan kepada perayu dengan faedah. Mahkamah Tinggi menolak permohonan perayu. Persoalan utama rayuan ini adalah sama ada responden berhak menamatkan perjanjian tersebut dan melucuthak deposit tersebut. Hujah-hujah perayu secara amnya meliputi tiga bahagian, iaitu: (i) responden telah gagal untuk memberi kerjasama kepada perayu bagi membolehkan penyelesaian perjanjian tersebut yang mana perayu telah gagal untuk memenuhi keperluan-keperluan yang ditetapkan oleh pemberi pinjaman perayu, Maybank iaitu responden hendaklah menyerahkan hak milik tanah kepada Maybank dan memasukkan

satu kaveat pemegang lien. Perayu mengatakan bahawa kegagalan atau keengganan responden untuk menyetujui untuk memasukkan satu kaveat pemegang lien ke atas tanah tersebut bagi pihak Maybank untuk kemudahan yang diberikan kepada syarikat bersekutu perayu, Country Heights Industries Sdn Bhd, yang bukan satu pihak kepada perjanjian tersebut, menunjukkan bahawa responden tidak bekerjasama seperti yang dimestikan di bawah fasal 30 perjanjian tersebut; (ii) masa bukan lagi merupakan inti pati perjanjian tersebut kerana perayu telah berunding dengan responden tentang cara dan masa bayaran baki tersebut; dan (iii) perbuatan responden menjadikan ia adil dan saksama agar deposit tersebut dipulangkan kepada perayu.

Diputuskan, menolak rayuan tersebut:

(1) Keengganan responden menyetujui pembentukan satu kaveat pemegang lien bagi pihak Maybank dijustifikasikan. Fasal 30 perjanjian tersebut yang mana perayu namakan sebagai fasal 'good faith' terbatas kepada kerjasama membuat tindakan atau perkara yang diberi kuasa atau dibenarkan di bawah terma-terma yang ditetapkan dalam perjanjian tersebut dan tidak menjangkau perkara-perkara yang tidak diperuntukkan dalam perjanjian tersebut. Fasal 30 tidak bermaksud bahawa responden hendaklah melakukan apa pun untuk memuaskan perayu sehingga mendedahkan responden kepada kehilangan dan kerugian. Perjanjian tersebut tidak memperuntukkan pembentukan kaveat untuk lien dan dengan peninggalan dalam perjanjian tersebut untuk lien sedemikian, ia tidak terbuka untuk perayu memohon pembentukan lien. Terma-terma dalam perjanjian tersebut adalah menyeluruh dan mandatori sifatnya. Mahkamah tiada alternatif tetapi terpaksa mentafsirkan perjanjian tersebut dengan ketat menurut terma-termanya sendiri (lihat perenggan 12).

(2) Pembentukan kaveat pemegang lien, melalui jaminan pihak ketiga, akan memprejudiskan responden. Pemberi pinjaman, Maybank sebagai balasan untuk tawaran kemudahan kredit kepada Country Heights Industries Sdn Bhd, menghendaki kaveat pemegang lien daripada responden sementara menunggu pembentukan satu gadaian oleh perayu. Sementara menunggu pembentukan gadaian, tanah responden menjadi jaminan untuk pinjaman kepada Country Heights Industries Sdn Bhd. Responden tidak akan membayar baki tersebut dengan segera tetapi akan membayar menurut terma-terma yang ditetapkan dalam perjanjian tersebut meskipun jumlah keseluruhan pinjaman tersebut dilepaskan kepada dan digunakan oleh Country Heights Industries Sdn Bhd. Kemudahan tersebut melampaui harga belian. Risiko yang nyata adalah sekiranya berlaku kegagalan oleh Country Heights Industries Sdn Bhd, tanah responden akan dijual dan responden tidak akan dibayar baki tersebut. Oleh itu, responden akan terdedah kepada risiko yang tidak sepatutnya dengan memberikan hak milik tersebut tanpa sebarang bayaran (lihat perenggan 15).

(3) Responden tidak membenarkan apa-apa lanjutan masa untuk penyelesaian itu tetapi mendesak bayaran dibuat pada tarikh yang ditetapkan. Tiada rundingan dibuat antara pihak-pihak (lihat perenggan 21). Tambahan pula, fasal 27 perjanjian tersebut dengan nyata memperuntukkan bahawa apa-apa perubahan kepada perjanjian hendaklah secara bertulis. Selagi satu perjanjian secara bertulis dibuat oleh pihak-pihak, semua hak dan obligasi di bawah perjanjian tersebut masih sah dan berkuatkuasa. Lagipun, fasal 32 perjanjian tersebut menghalang operasi penepian atau persetujuan tentang hak pihak-pihak; dan bahawa pihak-pihak adalah berhak untuk menuntut perlaksanaan spesifik peruntukan-peruntukan perjanjian tersebut; (lihat perenggan 23); *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 dibeza.

(4) Tiada keperluan untuk penamatan segera. Penamatan perjanjian tersebut berlaku 16 hari selepas tarikh yang ditetapkan. Berdasarkan keterangan, tiada penepian oleh responden berhubung haknya berkaitan bayaran pada tarikh yang ditetapkan di bawah perjanjian tersebut. Di bawah fasal 33 perjanjian tersebut, kegagalan atau kelewatan untuk menggunakan hak melucuthak wang tersebut dengan segera tidak menjejaskan atau mencacatkan hak responden untuk melucuthak wang tersebut. Justeru itu dengan fasal 33, hak responden untuk melucuthak wang tersebut di bawah perjanjian tersebut tidak terjejas kerana kelewatan (lihat perenggan 25).

(5) Tanggungjawab untuk membayar harga belian merupakan tanggungjawab utama (lihat perenggan 26). Oleh itu, apa-apa pelanggaran kerana kegagalan membayar harga belian memberi kesan sehingga mengakibatkan perjanjian tersebut dibatalkan dan deposit tersebut dilucuthak; *Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190 diikut. Dalam kes semasa, di mana masa adalah penting, responden berhak melucuthak deposit tersebut atas kegagalan perayu membayar harga belian pada masa yang ditetapkan (lihat perenggan 27); *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711 diikut. Oleh itu adalah tidak relevan bagaimana perayu membuat pengendaliannya untuk membayar harga belian tersebut. Harga belian hendaklah dibayar mengikut jadual yang ditetapkan. Ekonomi yang meleset tidak relevan dan bukan satu alasan untuk perlanggaran tanggungjawab asas untuk membayar baki tersebut. Kegagalan perayu untuk membayar baki tersebut adalah jelas satu perlanggaran kontrak yang memberi hak untuk responden melucuthak deposit tersebut. Responden tidak dikehendaki membuktikan yang ia mengalami apa-apa kerugian sebelum ia boleh melucuthak deposit (lihat perenggan 28); *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577 diikut.]

Notes

For cases on breach of contract for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3616–3638.

For cases on sale of land generally, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3551–4086.

Cases referred to

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675 (refd)
Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor [2005] 1 CLJ 501; [2005] 2 AMR 297 (refd)
Highceed Corp Sdn Bhd v Warisan Harta Sabah Sdn Bhd & Anor [2000] 5 MLJ 337 (refd)
Hong Huat Realty (M) Sdn Bhd, Re [1987] 1 MLJ 502 (refd)
Innterpreneur Pub Co v East Crown Ltd [2000] 3 EGLR 31 (refd)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (refd)
Llyod v Llyod (1837) 2 My & Cr 192 (refd)
Macronet Sdn Bhd v RHB Bank Sdn Bhd [2002] 3 MLJ 11 (refd)
Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577 (folld)
Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd [1979] 2 MLJ 190 (folld)
Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ 711 (folld)
Union Eagle Ltd v Golden Achievement Ltd [1997] 2 All ER 215 (refd)
Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245 (dist)

Appeal from: Civil Suit No MT1–22–834 of 1998 (High Court, Penang)

Logan Sabapathy (Ooi Huey Miin with him) (Logan Sabapathy) for the appellant.
RR Sethu (Chuah Chong Ewe with him) (Ng & Anuar) for the respondent.

Nik Hashim JCA (delivering judgment of the court):

BACKGROUND

[1] This appeal arose out of a sale and purchase agreement relating to several pieces of land in Sungai Petani which agreement was executed on 20March 1997 between the appellant (plaintiff in the court below) as purchaser and the respondent (defendant in the court below) as vendor for a consideration of RM71,409,848.04. At the time of the execution of the said agreement, a sum of RM7,140,984.80 being 10% of the total purchase price, was paid by the appellant by way of deposit and to account of the total purchase price. The receipt of the said sum was acknowledged by the respondent under cl 2.1(a) of the agreement. Under cl 2.1(b) of the agreement, the balance of the purchase price were to be settled in two trances as follows:

(i) 15% of the purchase price, ie RM10,711,477.20 was payable within nine months on or before 19 December 1997; and

(ii) final balance of 75% of purchase price, ie RM53,557,386.04 was payable on or before 19 December 1997 but the appellant has a right to extension of time of nine months for this payment upon payment of interest at 8%.

[2] The appellant failed to pay RM10,711,477.20 on 19 December 1997 nor the said RM53,557,386.04. On 4 January 1998 the respondent terminated the agreement and forfeited the deposit of RM7,140,984.80. The appellant filed a writ in the High Court applying for a declaration that the termination of the said agreement by the respondent was null and void, and the forfeited money of RM7,140,984.80 to be returned to the appellant with interest. On29 October 2001 the learned judge dismissed the appellant's application with costs. In his judgment the learned judge found that the appellant had failed to pay the sum of RM10,711,477.20 due on or before 19 December 1997 as required under cl 2.1(b)(i) of the agreement, and that under cl 4.3, the respondent was to hand over the documents of titles only against payment of the entire purchase price. He was of the view that the time did not cease to be of the essence of the contract and that the termination of the contract and forfeiture of the deposit were not unconscionable or inequitable. Hence, this appeal.

ISSUE AND CONTENTIONS

[3] The primary issue here is whether the respondent was entitled to terminate the contract and forfeit the deposit.

[4] The contentions of the appellant broadly cover three areas, namely:

(a) the respondent had failed to co-operate with the appellant to enable the completion of the contract in that the appellant had failed to meet the requirements set by the appellant's lender Maybank that the respondent was to deliver the land title to Maybank and create a lien-holder's caveat. The appellant alleged that the failure or refusal by the respondent to consent to lodgment of a lien-holder's caveat on the land in favour of Maybank for facilities granted to the appellant's associated company Country Heights Industries Sdn Bhd which was not a party to the sale agreement, is a non co-operation under cl 30; and

(b) the time had ceased to be of the essence of the contract as the appellant was negotiating with the respondent over the mode and time of payment of RM10,711,477.20.

(c) the conduct of the respondent was such that it would be just and equitable for the deposit to be returned to the appellant.

[5] It is the contentions of the respondent that there was no provision in the agreement for the creation of a lien-holder's caveat and that such a caveat was inconsistent with the express terms of the agreement. The respondent

was of the view that the creation of a lien-holder's caveat, by way of third party security, was unauthorised by law. With regard to time, the respondent argued that time had not ceased to be the essence of the contract as the respondent did not enter into any negotiation with the appellant but it was the appellant who wanted to meet the respondent. Further, in the circumstances of this case, the respondent's conduct was not unconscionable, and therefore, the deposit was rightly forfeited.

CLAUSES

[6] Since the interpretations of certain clauses in the agreement are crucial in arriving at a decision in this appeal, the relevant clauses are eproduced below:

Memorandum of Transfer

4.1 (a)–(f)

4.2 (i)–(iv)

4.3 Upon the execution of the agreement, the vendor shall utilise the deposit paid pursuant to cl 2.1(a) hereof to redeem the said property from Hongkong Bank Malaysia Berhad, and thereafter, but not later than three (3) months from the date of this agreement, the vendor shall deposit the original of the documents of titles for each of the lots comprising the said property with the vendor's solicitors as stakeholder. Upon full payment of the total purchase price, the vendor's solicitors are authorised to and shall forward the original documents of titles for each of the lots comprising the said property to the purchaser's solicitors. If the vendor fails to deliver the original documents of titles to the vendor's solicitors as stakeholder, then the obligation of the purchaser to pay the balance of the total purchase price under clause 2.1(b) shall be suspended until such time as the vendor shall have delivered the original of documents of titles to the vendor's solicitors.

Default by the Purchaser

6 If the purchaser fails neglects or omits to pay any sums payable under cl 2.1 herein or any part thereof within the time stipulated herein, the vendor shall be entitled forthwith to terminate this agreement and in such an event:

(i) Vendor shall be entitled to deal with or otherwise dispose of the said property in such manner and upon such conditions as the vendor shall deem fit as if this agreement had not been entered into; and

(ii) any payment paid by the purchaser hereunder shall be dealt with and disposed of as follows:

(a) firstly a sum equivalent to ten per centum (10%) of the purchase price shall be forfeited absolutely by the vendor as agreed liquidated damages:

(b) …

(c) …

Time

11 Time whenever mentioned shall be of the essence of this contract.

24 Entire Agreement

This Agreement-constitutes the entire agreement and understanding between the parties with respect to the matters dealt with in this agreement;

supersedes any other agreement, letters correspondence (oral or written or expressed or implied) entered into prior to this agreement; and

was not entered into by the parties in reliance of any agreement, undertaking, warranty or representation of any party not expressly contained or referred to in this agreement.

27 Amendments and Additions

No amendment, variation, revocation, cancellation, substitution or waiver of or addition or supplement to, of any of the provisions of this agreement shall be effective unless it is in writing and signed by the parties.

30 General Covenant

Each party has entered into this agreement in good faith and shall give all such assistance and information to the other party and execute and do and procure all other necessary person or companies, if any, to execute and do all such further acts, deeds, assurance and things as may be reasonably required so that full effect may be given to the terms and conditions of this agreement.

32 Knowledge & acquiescence

Knowledge or acquiescence by any party of or in any breach of any of the provisions of this agreement shall not operate as or be deemed to be a waiver of such provisions and notwithstanding such knowledge or acquiescence, such party shall remain entitled to exercise its rights and remedies under this agreement and at law and to require strict performance of all of the provisions of this agreement.

33 Right and remedies

The rights and remedies provided in this agreement are cumulative, and are not exclusive of any rights or remedies of the parties provided at law and no failure or delay in the exercise or the partial exercise of any such right or remedy or the exercise of any other right or remedy shall affect or impair any such right or remedy.

FINDINGS

[7] Clause 24 is an entire agreement clause that constitutes a binding agreement between the appellant and the respondent with regard to all the matters mentioned in the contract and therefore, in our judgment, the contract

does not permit any term to be implied or import any other considerations not in the contract. In *Innterpreneur Pub Co v East Crown Ltd* [2000] 3 EGLR 31 at p 32K–L right a somewhat similar provision to cl 24 is set out. In his judgment, Lightman J opined on the purpose and the effect of an entire agreement where at p 33A–B left he said:

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.

[8] In that case, the learned judge ruled that evidence of a collateral contract was inadmissible. He further added at p 33D left:

> ...the formula used is abbreviated to an acknowledgment by the parties that the agreement constitutes the entire agreement between them. That formula is, in my judgment, amply sufficient to constitute an agreement that the full contractual terms to which the parties agreed to bind themselves are to be found in the agreement and nowhere else. That can be the only purpose of the provision.

[9] The principle on the entire agreement clause in *Innterpreneur Pub* was followed by Abdul Aziz J (as he then was) in *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11. There he ruled that the entire agreement clause precluded variation by oral agreement. At p 25G the learned judge said:

> My opinion is simply this. The entire agreement clause was an agreement between the plaintiffs and the defendants. In agreeing to the clause, the parties must be presumed to have known of the existence of s 92 and of the exceptions in it and to have intended what the clause intended, that is to exclude any attempt to vary the agreement by an oral agreement or statement, which attempt can only be made through the exceptions in s 92. By agreeing, therefore, to the entire agreement clause, the plaintiffs agreed not to resort to any of the exceptions in s 92. They cannot, therefore, be allowed to prove the second precontractual representation or the oral agreement and to rely on them.

[10] It is pertinent to note that there is no dispute on the provisions respecting payments under cl 2.1 of the agreement, and in the event of default by the appellant to pay any sums payable under cl 2.1, the respondent is entitled under cl 6 to terminate the agreement and forfeit the deposit as agreed liquidated damages. The deposit in the instant case is 10% of the purchase price and the percentage is not unusual in a contract for the sale of land. The fact that the

amount of deposit is RM7,140,984.80 does not alter the position since 10% of the purchase price is normally a standard amount put as deposit. Lord Hailsham LC said in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89:

> There is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land.

[11] It is common ground that the appellant paid the deposit of 10% and the subsequent payment of RM 10,711,477.20 was not paid on or before 19December 1997 by the appellant. Both parties held each other in breach of the agreement and treated the agreement at an end save for the issue of whether the deposit was rightly forfeited or should be refunded.

LIEN-HOLDER'S CAVEAT

[12] With regard to the respondent's refusal to consent for the creation of a lien-holder's caveat in favour of Maybank, we are of the view that in the circumstances of this case, the refusal was justified. Clause 30 of the agreement which the appellant called a 'good faith' clause, is confined to co-operation for doing acts or things authorised or permitted under the terms set out in the agreement and certainly does not extend to matters not provided for in the agreement. The clause does not mean that the respondent must do whatever to please the appellant even to the extent of exposing the respondent to loss and detriment. The interpretation of the clause along the line of business common sense and customary practice as suggested by the appellant are not supported by authority. The agreement does not provide for the creation of a lien and by the omission in the agreement for such a lien, it is not open to the appellant to request for the creation of the lien. The only reference to security in the agreement is a charge. The terms in the agreement are exhaustive and mandatory in nature. It follows that the court has no alternative but to interpret the agreement strictly in accordance with its own terms.

[13] The creation of a lien is also inharmonious with the express terms of cl 4.3 of the agreement that the original document of titles and memorandum of transfer only be handed over to the appellant against the payment of the full purchase price, and not earlier. Pending full payment of the purchase price, the respondent's solicitors shall hold the original titles as stakeholder. If the titles are delivered to the purchaser before full payment of the purchase price ie contrary to cl 4.3, then the respondent's solicitors shall be in breach of their duty as stakeholder and shall be exposed to liabilities.

[14] The appellant contends that there is nothing in the National Land Code (NLC) to prohibit the creation of third party lien-holder's caveat. Whilst it is true that there is no prohibition as such in the NLC, but, quite apart from the absence of an obligation relating to the lien-holder's caveat in the agreement, the plaintiff had not shown why the respondent should allow its land to be used as security under a lien to the appellant to finance the commercial operations

of the appellant and or its associated company, Country Heights Industries Sdn Bhd, when the respondent was not immediately paid the 15% and 75% of the purchase price.

[15] Further, the creation of a lien-holder's caveat, by way of third party security, would prejudice the respondent. The lender Maybank in return for an offer of a credit facility of RM80 million to Country Heights Industries Sdn Bhd in its letter dated 30 August 1997 at p 285 of the appeal record, required a lien-holder's caveat from the respondent pending the creation of a charge by the appellant. Pending the creation of the charge, the respondent's land becomes security for the loan to Country Heights Industries Sdn Bhd. The respondent would not be paid the 15% and 75% of the purchase price immediately but would be paid according to the terms stipulated in the agreement even though the full loan sum was released to and used by Country Heights Industries Sdn Bhd. The facility far exceeded the purchase price. The obvious risk is that in the event of default by Country Heights Industries Sdn Bhd, the respondent's land would be sold and the respondent would not be paid the balance of the purchase price. Thus, the respondent would be exposed to unnecessary risk of parting with the titles without the payment.

[16] Consequently, we agree with the respondent's stand that since a lien-holder's caveat is not provided for in the agreement and is inconsistent with the express terms of the agreement, nor is there any such implied term to create a lien pleaded in the appellant's statement of claim, the issue of lien-holder's caveat is wholly irrelevant in the present case. Therefore, there was nothing unreasonable in the respondent's conduct in protecting its own position and its own land to refuse to execute a lien-holder's caveat. The appellant, through Tan Sri Lee Kim Yew's letter dated 2 January 1998 (at p 379 record of appeal) to the respondent even accepted the position that a lien-holder's caveat cannot be created.

TIME

[17] We now deal with the question of time. The appellant claimed that there were negotiations and therefore without reinstating time to be of the essence by giving the appellant reasonable notice to complete the purchase, the respondent ran foul of the principle in *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 where Raja Azlan J (as he then was) at p 247G right said:

> Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid...

[18] And at p 248C left His Lordship continued:

> It would therefore be inequitable, in view of the dealings which had taken place between the parties, to allow the defendants to enforce his strict legal rights against the plaintiff which he had been led to believe would not be enforced against him.

[19] The facts in that case are readily distinguishable, and therefore, it follows that the principle therein is not applicable to the present case. Unlike in that case, the respondent here never allowed any extension of time for completion but insisted on payment on the due date. The respondent by letter dated 15November 1997 reminded the appellant that the 15% payment was due on 19 December 1997. The appellant by letter dated 15 December 1997 sought an extension of time to pay due to the 'current economic situation' but the request was rejected by the respondent in its letter dated 16 December 1997. It is to be noted that economic slowdown is not a good reason for failing to pay the balance of purchase price. Further, in the present case, the appellant's witness, SP2 in his testimony, maintained that the appellant had the cash to pay the 15% payment on 19 December 1997 and yet the appellant did not pay. Since the appellant confirmed that it had the money to pay, the alleged failure on respondent to cooperate to consent for the creation of a lien-holder's caveat is therefore irrelevant as it is the appellant who refused to pay the 15% of the purchase price on the due date.

[20] The importance of time with regard to payment of purchase price needs no emphasis. If emphasis is still needed we can do no better than to refer to the Privy Council case in *Union Eagle Ltd v Golden Achievement Ltd* [1997] 2 All ER 215 where it was held that a ten minute delay in tendering the purchase money on account of traffic congestion was fatal. In the instant case, the learned judge found as a fact that there was no extension of time granted or even no negotiation for extension of time. As such, the parties were bound by cl 11 of the agreement which states very clearly that time shall be of the essence of the contract.

[21] The learned judge also found as a fact that there was no negotiation between the parties. The meeting on 2 January 1998 was initiated and requested by the appellant and Tan Sri Lee Kim Yew, the only person who spoke on behalf of the appellant at the meeting, had chosen not to testify in this proceeding. On the other hand, SD2 the only person who spoke on behalf of the respondent, testified that there was no negotiation whatsoever and at the commencement of the meeting, SD2 had made clear to Tan Sri Lee Kim Yew and the appellant that the respondent's representative had no mandate or power to negotiate. This is what the learned judge said on the meeting at pp 7–8 of his judgment:

> Menurut surat di muka surat 123 ABD mesyuarat pada 2 Januari 1998 telah diminta oleh plaintif dan diakui oleh SP1 semasa perbicaraan. Mesyuarat ini tidak menghasilkan sebarang rundingan, malahan wakil defendan tiada mandate untuk membuat sebarang keputusan. Saya telah meneliti surat plaintif bertarikh 2 Januari 1998 mengenai rundingan di mesyuarat itu. Saya dapati wakil plaintif yang bercakap. Wakil defendan hanya mendengar. Wakil plaintif menerangkan tentang lien-holder's caveat. Wakil defendan mendengar sahaja. Pada pendapat saya dalam keadaan sedemikian defendan bukan merundingkan untuk melanjutkan tempoh pembayaran baki harga belian.

[22] Thus, on the facts, the learned judge was correct to conclude that there was no negotiation.

[23] Furthermore, cl 27 of the agreement expressly provides that any variation to the agreement must be in writing. Until an agreement in writing is reached by the parties, all rights and obligations under the agreement remain valid and enforceable. The meeting on 2 January 1998 did not result in any agreement in writing, hence the provisions of the agreement remained intact and unaltered. Besides, cl 32 prevents the operation of waiver or acquiescence on the rights of the parties; and that the parties are entitled to demand strict performance of the provisions of the agreement.

TERMINATION

[24] On the question of termination, the appellant complained that the respondent did not terminate the agreement immediately, but allowed the date of 19 December 1997 to pass and participated in the meeting of 2 January 1998. And as such, there would have been a clear need to fix a new date for payment.

[25] With respect, we do not agree with the appellant. We agree with the respondent that there is no need for immediate termination. The termination of the agreement took place on 4 January 1998, ie 16 days after the due date 19 December 1997. On the evidence, there was no waiver by the respondent on its rights with regard to the payments on the due date under the agreement. Under cl 33, failure or delay to exercise the right to forfeit immediately shall not affect or impair the respondent's right to forfeit. Hence by the provision, the respondent's right to forfeit under the agreement is not lost by the delay.

FORFEITURE

[26] The obligation to pay the purchase price is a fundamental obligation. The Court of Appeal in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 at p 682 ruled:

> In the absence of any special considerations in a contract for the sale of land, the obligation to pay the purchase price is fundamental.

[27] Thus, any breach for non payment of the purchase price shall go to the root of the agreement thereby rendering the agreement terminated and the deposit forfeited (*Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190). In the instant case, where time was stipulated as of the essence, the respondent was entitled to forfeit the deposit on account of the appellant's breach to pay the balance of purchase price on time (see *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711).

[28] It is therefore irrelevant in the present case how the appellant made its arrangements to pay the purchase price. The purchase price must be paid on schedule. The economic slowdown is not relevant and does not excuse the

breach of fundamental obligations to pay the balance of purchase price. Such events do not provide a basis for relief (see *Re Hong Huat Realty (M) Sdn Bhd* [1987] 1 MLJ 502 at p 507; *Highceed Corp Sdn Bhd v Warisan Harta Sabah Sdn Bhd & Anor* [2000] 5 MLJ 337). So, the appellant's failure to pay the 15% of the purchase price was clearly a breach of contract entitling the respondent to forfeit the deposit. The deposit in the instant case was 10% of the purchase price. Such sum is a reasonable sum and is not an unconscionable amount. The respondent was not required to prove that it had suffered any damage before it could forfeit the deposit (*Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577).

[29] The clauses in the sale and purchase agreement are complete and unambiguous in their terms that there can be no other construction possible then the one which was held by the learned judge. Lord Cottenham LC in *Llyod v Llyod* (1837) 2 My & Cr 192, 202 once said: 'If the provisions are clearly expressed, and there is nothing to enable the court to put upon them a construction different from that which the words import, no doubt the words must prevail.' (see *Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 1 CLJ 501; [2005] 2 AMR 297).

[30] It is our judgment that on a proper reading of the various clauses of the agreement and the evidence tendered in court, the agreement was lawfully terminated, and the RM7,140,984.80 being 10% of the purchase price, is a true deposit and was validly and properly forfeited by the respondent. The respondent was not in breach of the agreement; neither it was guilty of any unconscionable conduct. The learned judge was right in dismissing the appellant's claim. The appeal is accordingly dismissed with costs and the deposit be paid to the respondent to account of taxed costs.

Appeal dismissed.

Reported by Peter Ling